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In The

Supreme Court of the United States

October Term, 1995

BRIGHTON MANAGEMENT SERVICES, INC., BRIGHTON ENTERPRISES, INC., CHARLEY'S DREAM, INC., DAILEY PLANET NEWS, INC., ELGEE NOVELTIES, INC., KELLY BROOKS t/a ELGEE NOVELTIES, DANIEL LISS d/b/a DANNY'S NEW ADAM & EVE, WOOD ENTERPRISES, INC., 57 N 13TH STREET CORP., 120 S 13TH STREET CORP., 942 MARKET STREET CORP. and 1632 MARKET STREET AMUSEMENT,

Petitioners,

vs.

CITY OF PHILADELPHIA, TAX REVIEW BOARD,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED FOR REVIEW

Does Philadelphia's Mechanical Amusement Device Ordinance, which imposes a revenue-raising tax as a precondition to the petitioners' use of coin-operated devices for the exhibition, for profit, of film, video and live presentations, violate the First Amendment's free speech guarantee?

STATEMENT PURSUANT TO RULE 29.6

There are no parent companies nor non-wholly owned subsidiaries of any of the corporate petitioners.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Brighton Management Services, Brighton Enterprises, Inc., Charley's Dream, Inc., Dailey Planet News, Inc., Elgee Novelties, Inc., Kelly Brooks, Daniel Liss, Wood Enterprises, Inc., 57 N 13th Street Corp., 120 S 13th Street Corp., 942 Market Street Corp. and 1632 Market Street Amusement, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case on June 26, 1996.

OPINIONS BELOW

The judgment of the Supreme Court of Pennsylvania entered on June 26, 1996 denied the petitioners' petition for allowance of an appeal and is reprinted in Appendix A to this Petition at page 1a. The Order and Opinion of the Commonwealth Court of Pennsylvania filed on November 27, 1995, from which these petitioners sought to appeal to the Supreme Court of Pennsylvania is unreported. The Order of the Commonwealth Court is printed in Appendix B at page 3a. The Opinion of the Commonwealth Court is reprinted in Appendix C at page 4a. The Commonwealth Court reviewed the April 5, 1995 Order of the Court of Common Pleas of Philadelphia County. The Court of Common Pleas Order is reprinted in Appendix D at page 8a and a transcript of that Court's decision is reprinted in Appendix E at page 9a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 26, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) in that the petitioners request this Court to review the validity of an ordinance of the

City of Philadelphia to determine whether it is repugnant to the Constitution of the United States.

STATUTES AND ORDINANCES INVOLVED

This case involves Philadelphia's Mechanical Amusement Device Ordinance adopted according to the authority of the Sterling Act, 53 Pa. C.S.A. § 15971 allowing cities of the first class to tax people, transactions, occupations, privileges, subjects and personal property for general revenue purposes.

The Mechanical Amusement Device Ordinance provides as follows:

> § 19-901. Definition.
>
> (1) Mechanical Amusement Device. Any machine or device for amusement or entertainment which is operated by the insertion of a coin or token representing such coin, but excluding any machine or device which is operated by a sound reproduction licensee pursuant to § 9-202(3).
>
> § 19-902. Registration.
>
> (1) Every person who uses, or permits the use for profit, of any mechanical amusement device shall, before using or permitting the machine or device to be used, register the mechanical amusement device with the Department.

(2) The application for registration of any mechanical amusement device shall describe it and give its serial number.

(3) The Department shall, at the time the tax imposed by § 19-903 is paid, issue a label, disc or tag for the year for which the tax has been paid, which shall be attached by the owner or operator of the mechanical amusement device for which it is issued.

(4) No person shall use or permit the use for profit of any mechanical amusement device for which the tax imposed by § 19-903 has not been paid or to which a label, disc or tag issued for that device for the current year is not attached.

§ 19-903. Imposition of Tax.

(1) Every person who uses or permits the use for profit of any mechanical amusement device shall pay an annual tax in the amount of $25 for each mechanical amusement device, on or before the first day of January of each year.

With City council Bill No. 1164, § 19-903(1) was amended to increases the tax to $100 for eachdevice effective with the taxes due for the calendar year 1983.

STATEMENT OF THE CASE

A. Nature of the Action and Jurisdiction

The petitioners appealed a determination of the City of Philadelphia's Tax Review Board that the City's Mechanical Amusement Device Ordinance, as applied to their coin-operated devices that are used for the exhibition of film and live entertainment, does not violate their First Amendment free speech rights. The Court of Common Pleas affirmed the decision of the Tax Review Board and the petitioners appealed to the Commonwealth Court of Pennsylvania. That court, likewise, affirmed the decision of the Court of Common Pleas and the petitioners sought to appeal to the Supreme Court of Pennsylvania. The Supreme Court denied the petitioners' petition for allowance of appeal and the petitioners now petition this Court for a writ of certiorari to the Supreme Court of Pennsylvania invoking this Court's jurisdiction to review the final judgments rendered by the highest court of a state where the validity of a statute of a state is drawn in question on the ground of its being repugnant to the Constitution. 28 U.S.C. § 1257(a).

B. The Ordinance and its Application to the Petitioners

This appeal concerns the issue of whether a revenue-raising tax may be imposed as a pre-condition for engaging in an activity protected by the First Amendment's free speech guarantee. Each of the petitioners, during the relevant year, maintained coin-operated devices for the purpose of exhibiting to their retail patrons film, video or live presentations of an adult nature for profit. Philadelphia Code, Chapter 19-900 requires that devices for entertainment operated by the insertion of a coin or token be registered. At the time of registration, a tax is required to be paid. The Ordinance further

provides for the prohibition against the use of such a device for which the tax — $100. for each such device — has not been paid.

The Mechanical Amusement Device Ordinance and its amendments were promulgated according to the authority of the Sterling Act, 53 Pa. C.S.A. § 15971, allowing cities of the first class to tax people, transactions, occupations, privileges, subjects and personal property for general revenue purposes. It is without dispute that the Mechanical Amusement Device tax is imposed for general revenue-raising purposes only and not for the purpose of defraying the cost of regulation of the devices.

Registration of the devices is accomplished by completing the City's form entitled Certificate of Ownership and Tax Return Mechanical Amusement Device Tax (Form 83-T-393). The obverse of each form contains a warning as follows:

> Failure to comply with the requirements set forth in the Philadelphia Code in the Regulations may subject any person liable for the tax to a fine not exceeding $300.00 or to imprisonment not to exceed ninety (90) days for each violation, as provided by Section 1-109 of the Philadelphia Code.

Rather than incur liability for criminal prosecution and attendant penalties upon conviction, each of the taxpayers completed and tendered his or its Certificate of Ownership and Tax Return for 1983 and each subsequent relevant year, scheduled his or its devices and paid the required tax. Each of the Tax Returns was annotated "in protest" as were the checks submitted in payment of the taxes. Payments were made by the taxpayers in protest for the purpose of insuring that they might

continue to offer film or video or live exhibitions by means of coin-operated devices without fear of prosecution for violations of the city's Mechanical Amusement Device Ordinance while, at the same time, preserving their ability to challenge the Ordinance, and, if successful, obtain a refund.

C. The Rulings Below

Each of the petitioners, for the applicable year, petitioned the City of Philadelphia's Department of Collection for a refund pursuant to Ordinance § 19-1703 maintaining that the tax had been paid "under an invalid law." In particular, the petitioners pointed out that Philadelphia's Mechanical Amusement Device Ordinance requires the payment of a revenue-raising tax as a precondition for the registration of the taxpayers' coin-operated devices. The devices are used exclusively for the presentation of film, video and live entertainment performances — that is, they are used exclusively for the dissemination of communication protected by the Constitution's free speech guarantee. The petitioners' position was then and is now that the City has laid a tax on the activity of disseminating protected speech by means of their coin-operated devices in violation of the First Amendment's free speech guarantee. They further maintain that the application of the tax to them is unconstitutional as the tax is required to be paid as a precondition for the use of the devices for the dissemination of speech contrary to the principles established by this Court in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

In every case, the Department of Collections denied the petitioners' requests for refunds. The petitioners sought review by the City's Tax Review Board. The Tax Review Board likewise rebuffed the petitioners and they appealed to the Court of Common Pleas. With its Order of April 5, 1995, the Court of Common Pleas affirmed the decision of the Tax Review Board. It said:

> The appellants contend the MAD tax is invalid as applied to them basically on First Amendment grounds. They argue, for example, that the tax is a prior restraint. I think otherwise. I don't believe that this is a tax upon the expression of ideas. Instead, it is a content-neutral tax upon doing business via coin-operated machines. As such, it's just another tax in a long line of taxes on, quote, "doing business," close quote. It resembles an amusement tax that's popular here in Philadelphia which theater and stadium owners typically pass on to their patrons.
>
> With all, I find against appellants and in favor of the city on the substantive issue. To the extent that it is relevant, I will incorporate here the First Amendment discussion of Judge Goodheart in the case of *All Purpose Vending vs. City of Philadelphia* . . .
>
> In addition, there is some relevant language in the Commonwealth Court's opinion in the appeal of the *All Purpose Vending* case. [Citation omitted.] Quote: "The ordinance does not act as a prior restraint on appellants' right of free speech," close quote.

Appendix E page 11a.

The petitioners appealed from the determination of the Court of Common Pleas to the Commonwealth Court of Pennsylvania. That Court affirmed the decision of the Court of

Common Pleas. The Commonwealth Court explained:

> The First Amendment does not prohibit all regulation of the press, speech, or expression. Government can levy generally applicable regulations without constitutional violation. *Minneapolis Star & Tribune v. Minnesota Comm'n of Rev.*, 460 U.S. 575 (1983). Courts have found First Amendment violations where a tax has a censorial or discriminatory purpose, where the tax is applied differently to First Amendment speakers, and where the tax depends on the content of the message. [Internal footnotes omitted.] The taxpayers in this case make no such assertion; the taxpayers contend that because payment of the tax is a precondition to the exercise of their constitutional rights, the tax acts as a prior restraint. We disagree.
>
> Prior restraint exists where a government order "restricts or prohibits speech prior to its publication" on the basis of its content. The facts in this case do not support such a claim. The Amusement Device Tax in no way prohibits speech prior to publication. The tax involves no censorship, no prohibition, and no discretion as to which devices will be registered and which will be denied registration. All coin-operated amusement devices covered by the tax are to be registered, and registration cannot be denied once the tax is paid.

> Accordingly, we find the Tax Review Board committed no error, and we affirm.

Appendix C pages 6a to 7a.

The petitioners sought to appeal the determination of the Commonwealth Court to the Supreme Court of Pennsylvania. However, on June 26, 1996, their petition for allowance of appeal was denied by that court.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Pennsylvania has left undisturbed a determination that the City of Philadelphia may impose a revenue-raising tax as a precondition to engaging in an expressive activity without working a prior restraint or otherwise violating the First Amendment's free speech guarantee as long as the tax is not applied on the basis of content and the tax collector is without discretion in the application of the tax. If the Commonwealth Court is correct, then the United States Supreme Court incorrectly decided *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) and the holdings of all of *Murdock's* progeny were wrong also. That simply cannot be so.

In *Murdock v. Pennsylvania,* the United States Supreme Court had considered the constitutionality of a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee. The United States Supreme Court reversed the convictions of Jehovah's Witnesses convicted under the ordinance of soliciting and distributing religious literature without a license. The licensing ordinances before it are strikingly similar, in their operation and effect, to the operation and effect of the city's MAD Ordinance. In *Murdock,* the Supreme Court observed:

We do not mean to say that religious groups and the press are free from all financial burdens of government. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. *It is quite another to exact a tax from him for the privilege of delivering his sermon* . . . The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance [. . .]

It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax — a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. *A state may not impose a charge for the enjoyment of a right granted by the federal constitution.*

. . . In all of these cases, the issuance of the permit or license is dependent upon the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities . . . or to . . . realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses

> of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties . . . and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax.

Murdock v. Pennsylvania, 319 U.S. at 112-114. (Citations omitted, emphasis added.)

At the outset, it is plain that the Commonwealth Court was wrong when it determined that Philadelphia's MAD tax does not act as a prior restraint. The City's tax, as was the tax under review in *Murdock*, is fixed in amount and unrelated to the scope of the activities of the taxpayers or their realized revenues. The tax is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the taxpayers' activities. It is simply a flat tax levied and collected as a condition to the pursuit of an activity — the exhibition of film, video and live presentations — whose enjoyment is guaranteed by the free speech clause of the First Amendment. Accordingly, just as the license tax "restrain[ed] in advance" Murdock's exercise of his constitutional liberties of press and religion, the City's MAD tax "restrains in advance" the taxpayers' constitutional liberties of speech. That is to say, the application of the City's tax is every bit as much a "prior restraint" on the taxpayers' free speech rights as the license tax was a prior restraint on Murdock's free press and free exercise rights guaranteed by the same First Amendment.[1]

---

1. *See also Follett v. Town of McCormick, S.C.*, 321 U.S. 573, 577 (1944) (the exaction of the tax is as obnoxious as "the imposition of a (Cont'd)

Although *Murdock* invalidated a form of tax found to interfere with freedom of religion, it is evident from *Murdock* and subsequent decisions applying *Murdock* that its holding is much broader. As observed earlier, the *Murdock* Court noted the impermissibility of the exaction of a tax for the privilege of carrying on another constitutionally protected activity — interstate commerce. Moreover, it specifically observed that

> Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way
> . . .

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 111 (1943).[2]

(Cont'd)
censorship or previous restraint"); *Swaggart v. Calif. Equalizatiion Bd.*, 493 U.S. 378, 386-387 (1990) ("Our decisions in [*Murdock* and *Follett*] resulted from the particular nature of the challenged taxes — flat license taxes that operated as a prior restraint on the exercise of religious liberty."); *Minneapolis Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575, 587 n. 9 (1983) (a tax imposed as a condition of engaging a protected activity is "a form of prior restraint on speech"); *Forsythe Cy. v. Nationalist Movement*, 505 U.S. __, 120 L. Ed. 2d 101, 111 (1992) (". . . ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies . . . is a prior restraint on speech.")

2. *See, e.g., Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991) (Newsrack license fee); *Nationalist Movement v. City of Cumming*, 913 F.2d 885 (11th Cir. 1990) (Parade or rally license fee); *Fabulous Assoc. v. Pa. Public Utility Comm'n*, 896 F.2d 780 (3rd Cir. 1990) (requirement of potential user of telephone message service to purchase additional equipment to access service; *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976) ($1 non-refundable inspection fee required before displaying temporary political campaign sign constituted unconstitutional tax; requirement of payment of $5 refundable deposit before displaying signs

(Cont'd)

If the Ordinance imposed a tax that discriminated on the basis of the content of the communicative nature of the taxpayer's enterprise, it would clearly be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987) (sales tax scheme which exempted from tax some but not all classes of magazines held to violate free press guarantee of First Amendment). Similarly, a taxation scheme which singles out the press for differential treatment is also presumptively unconstitutional. *Minneapolis Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575 (1983) (special use tax violated First Amendment both by singling out press for initial taxation and by targeting tax only against small group of newspapers).

The fact, however, that the City's tax is content-neutral,

(Cont'd)
also unconstitutional); *Hull v. Petrillo,* 439 F.2d 1184 (2nd Cir. 1971) ($15 peddlers license fee applied to sale of newspapers on city streets; *Distribution Systems v. Old Westbury,* 785 F. Supp. 347 (E.D.N.Y. 1992) ($25 license fee for newspaper distribution); *Gannett Satellite Info. Network v. Metro Transp.*, 579 F. Supp. 90 (S.D.N.Y. 1984) (Revenue raising license fee for newsracks invalidated); *Wendling v. City of Duluth,* 495 F. Supp. 1380 (D. Minn. 1980) (Adult book store license fee used to finance enforcement of separate obscenity ordinance); *Bayside Enterprises, Inc. v. Ellwest Stereo Theaters, Inc.*, 450 F. Supp. 696 (N.D. Fla. 1978) (Adult entertainment license fee invalid in absence of demonstration that fees were necessary to cover reasonable cost of licensing system and were used for no other purpose); *Moffett v. Killian,* 360 F. Supp. 228 (D. Conn. 1973) (Sound truck license fee invalidated in absence of evidence for justification); *NAACP v. Chester,* 253 F. Supp. 707, 714 (E.D. Pa. 1966) ($25 fee for use of sound truck invalid for a defendant does not justify basis of administrative cost); *Moffett v. Killian,* 360 F. Supp. 228 (D. Conn. 1973) ($35 legislative lobbying fee invalid where total of fees far in excess of amounts actually needed to administer registration provision of lobbying statute); *Fernandez v. Limmer,* 663 F.2d 619, 632 (5th Cir. 1982), *cert. dismissed,* 458 U.S. 1124 (1982) ($6 per day permit application fee for solicitation on airport premises invalidated in absence of justification.)

non-discretionary and one of general application will not save it. The license fee imposed on Murdock by the City of Jeanette had all of those characteristics — it was content-neutral, non-discretionary and applied generally. Those features did not save it from Murdock's claims that the application of the license fee to him violated his free press and free exercise rights. As the Supreme Court said of the tax under scrutiny in *Murdock*

> The fact that the Ordinance is "non-discriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. The license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the Ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115 (1943).

Nor is it of any consequence that the petitioners may exhibit their motion pictures, videos and live entertainment by means of the same devices but without charging a fee. First Amendment protection is not lost because the communication is sold rather than given away. *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781 (1988) (speaker's rights are not lost merely because compensation is received); *Heffron v. International Society for Krishna Consc., Inc.*, 452 U.S. 640, 647 (1981); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964). Nor is it of any significance that the taxpayers may

exhibit their films, videos and live entertainment through some other means or in another place where they will not be subject to the tax.

> [O]ne is not have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schad v. Borough of Mt. Ephraim, 452 U.S. 153 (1981); *Southeastern Promotions, Ltd. v. Conrad,* 421 U.S. 546 (1975); *Schneider v. New Jersey,* 308 U.S. 147, 163 (1939).

The coupling of a registration requirement with the threat of a fine or imprisonment for its disobedience is, in these circumstances, a clear example of a prior restraint. Further, if the City may impose its tax in these circumstances, it may impose such a tax without limitation. As the power to tax an expressive activity without limitation is the power to destroy it, granting that power to government is constitutionally intolerable. *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 113-115 (1943).

The United States Supreme Court has never approved, so far as these petitioners are aware, a requirement that a fee or a tax or other charge be paid for revenue-raising purposes as a pre-condition for the exercise of a constitutional right — *any* constitutional right. Nor has any *other* court, to these petitioners' knowledge. Consistent application of the principles established in *Murdock* and uniformly applied in the half-century since requires the invalidation of the City's Mechanical Amusement Device Tax as it has been imposed on these taxpayers.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted to review the Order of the Supreme Court of Pennsylvania entered on June 26, 1996. In the event that the petition is granted, petitioners pray that that court be reversed, and that the cause be remanded and the court below be directed to enter an order reversing the determination and order of the Commonwealth Court of Pennsylvania and further directing that the cause be remanded to the Court of Common Pleas for a determination of the amount of refund due to each petitioner and for such other and further proceedings as may be taken consistent with this Court's opinion.

Respectfully submitted

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APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT DATED JUNE 26, 1996

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 1017 E.D. Alloc. Dkt. 1995

BRIGHTON MANAGEMENT SERVICE, INC. [designated as BRIGHTON MANAGEMENT SERVICES, INC., in common pleas court], BRIGHTON ENTERPRISES, INC., CHARLES DREAM, INC., DAILY PLANET NEWS, INC., ELGEE NOVELTIES, INC., KELLY BROOKS t/a ELGEE NOVELTIES, WOOD ENTERPRISES, INC., 57 N. 13TH STREET CORP., and 1632 MARKET STREET AMUSEMENT,

Petitioners

v.

CITY OF PHILADELPHIA, TAX REVIEW BOARD,

Respondent

Petition for Allowance of Appeal from Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 26th day of June, 1996, the Petition for Allowance of Appeal is Denied.

Appendix A

Madame Justice Newman did not participate in the consideration or decision of this matter.

TRUE COPY FROM THE RECORD
Attest: 6/26/96

s/ John W. Person, Esquire
John W. Person, Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania
Eastern District

APPENDIX B — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED NOVEMBER 27, 1995

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1038 C.D. 1995

BRIGHTON MANAGEMENT SERVICE, INC. [designated as BRIGHTON MANAGEMENT SERVICES, INC., in common pleas court], BRIGHTON ENTERPRISES, INC., CHARLES DREAM, INC., DAILY PLANET NEWS, INC., ELGEE NOVELTIES, INC., KELLY BROOKS t/a ELGEE NOVELTIES, WOOD ENTERPRISES, INC., 57 N. 13TH STREET CORP., 120 S. 13TH STREET CORP., and 1632 MARKET STREET AMUSEMENT,

Appellants

v.

CITY OF PHILADELPHIA, TAX REVIEW BOARD,

ORDER

AND NOW, this 27th day of November, 1995, the decision of the Court of Common Pleas of Philadelphia County is affirmed.

s/ James Gardner Colins
JAMES GARDNER COLINS, President Judge

APPENDIX C — OPINION IN THE COMMONWEALTH COURT OF PENNSYLVANIA FILED NOVEMBER 27, 1995

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1038 C.D. 1995
Argued: October 18, 1995

BRIGHTON MANAGEMENT SERVICE, INC. [designated as BRIGHTON MANAGEMENT SERVICES, INC., in common pleas court], BRIGHTON ENTERPRISES, INC., CHARLES DREAM, INC., DAILY PLANET NEWS, INC., ELGEE NOVELTIES, INC., KELLY BROOKS t/a ELGEE NOVELTIES, WOOD ENTERPRISES, INC., 57 N. 13TH STREET CORP., 120 S. 13TH STREET CORP., and 1632 MARKET STREET AMUSEMENT,

Appellants

v.

CITY OF PHILADELPHIA, TAX REVIEW BOARD

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE SANDRA SCHULTZ NEWMAN, Judge

Appendix C

OPINION BY PRESIDENT JUDGE COLINS FILED: November 27, 1995

Brighton Management Services and ten other operators of coin-operated adult entertainment devices (collectively, taxpayers) appeal from the April 5, 1995 order of the Court of Common Pleas of Philadelphia County (Common Pleas), affirming the Philadelphia Tax Review Board's decision that Philadelphia's Mechanical Amusement Device tax[1] does not violate the First Amendment of the United States Constitution[2] as applied to the taxpayers.

The tax applies to "[a]ny machine or device for amusement or entertainment which is operated by the insertion of a coin or token representing such coin, but excluding any machine or device which is operated by a sound production licensee pursuant to § 9-303(3)." The Philadelphia Code § 19-901. In addition to the devices maintained by the taxpayers, mechanical amusement devices include jukeboxes, pinball machines, and video games. Amusement device operators are required to register, and pay a $100 tax for, each device; the taxpayer receives a registration label for each device.

Each of the taxpayers in this case maintains coin-operated devices that exhibit film, video, or live presentations of an adult nature to retail customers. The taxpayers assert that the tax, as applied to them, constitutes an unconstitutional prior restraint

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1. The Philadelphia Code §§ 19-901 – 19-903.

2. U.S. Const. amend. I.

of protected expression because using, or permitting the use of, the devices without having paid the tax and obtained the registration label subjects the taxpayer to criminal penalties upon conviction. The Tax Review Board found the tax to be a revenue-raising provision that applies regardless of the content of the entertainment and that issuance of the registration label is mandatory and not discretionary. The Board concluded that the tax does not constitute a prior restraint on the taxpayer's First Amendment rights and is not unconstitutional as applied. Common Pleas affirmed.

Our scope of review is the same as that of the trial court taking no additional evidence; that is, whether constitutional rights were violated, whether errors of law were committed, or whether the Tax Review Board's findings of fact were supported by substantial evidence. *Insinger Machine v. Tax Review Board*, 645 A.2d 365 (Pa. Cmwlth. 1994), *petition for allowance of appeal denied*, 540 Pa. 62 __, 657 A.2d 494 (1995).

The First Amendment does not prohibit all regulation of the press, speech, or expression. Government can levy generally applicable regulations without constitutional violation. *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Courts have found First Amendment violations where a tax has a censorial or discriminatory purpose,[3] where the tax is applied differentially to First Amendment speakers,[4] and where the tax

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3. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

4. Differential taxation triggers heightened scrutiny if the tax targets a small group of speakers or discriminates on the basis of the content of the speech. *Leathers v. Medlock*, 499 U.S. 439 (1991).

depends on the content of the message.[5] The taxpayers in this case make no such assertions; the taxpayers contend that because payment of the tax is a precondition to the exercise of their constitutional rights, the tax acts as a prior restraint. We disagree.

Prior restraint exists where a government order "restricts or prohibits speech prior to its publication"[6] on the basis of its content. The facts in this case do not support such a claim. The amusement device tax in no way prohibits speech prior to publication. The tax involves no censorship, prohibition, and no discretion as to which devices will be registered and which will be denied registration. All coin-operated amusement devices covered by the tax are to be registered, and registration cannot be denied once the tax is paid.

Accordingly, we find the Tax Review Board committed no error, and we affirm.

s/ JAMES GARDNER COLINS
JAMES GARDNER COLINS, President Judge

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5. *Regan v. Time, Inc.*, 468 U.S. 641 (1984).

6. Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure, § 20.16, at 80 (2d ed. 1992). "Such orders may include censorship of movies, denial of mail privileges, refusal of access to a public forum and judicial protective or 'gag' orders against the press in criminal cases." *Id.* at 80-81 (footnotes omitted).

APPENDIX D — ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION DATED APRIL 5, 1995

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT OF PENNSYLVANIA CIVIL TRIAL DIVISION

No. 9410-0198

Brighton Management Services

v.

TAX REVIEW BOARD ("TRB")

ORDER

AVELLINO, J.

AND NOW, to wit, this 5th day of April, 1995, this appeal is GRANTED/**DENIED**, and the decision of the TRB dated October 6, 1994 is affirmed.*

BY THE COURT:

s/ Bernard J. Avellino, J.
Bernard J. Avellino, J.

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* For an explanation, See Transcript this date.

APPENDIX E — TRANSCRIPT OF PROCEEDINGS DATED APRIL 5, 1995

IN THE COURT OF COMMON PLEAS FIRST JUDICIAL DISTRICT OF PENNSYLVANIA TRIAL DIVISION

OCTOBER TERM, 1994
NO. 0198

BRIGHTON MANAGEMENT SERVICES, INC., et al.,

Appellants,

vs.

CITY OF PHILADELPHIA, TAX REVIEW BOARD, and POLICE COMMISSIONER OF PHILADELPHIA, in his official capacity only,

Appellees.

Courtroom "N"
Complex Litigation Center
Wanamaker Building
Philadelphia, Pennsylvania
April 5, 1995

BEFORE:

HONORABLE BERNARD J. AVELLINO, J.

Appendix E

[2] APPEARANCES:

EVENS, OSBORNE, KREIZMAN & BONNEY
P.O. BOX BB
Red Bank, NJ 07701-0569
By: LEWIS H. ROBERTSON, ESQUIRE,
For the Appellants;

MARGARETE E. PAWLOWSKI, ESQUIRE
Assistant City Solicitor
1101 Market Street - 10th Floor
Philadelphia, PA 19107-2997
For the Appellees.

[3] THE COURT: This is the case of Brighton Management Services et al., vs. the Tax Review Board. This appeal implicated two issues. The first issue was whether or not the TRB erred in entertaining these appeals to begin with. Some of the appeals were filed more than three years after the date that the tax had in fact been paid.

On that issue, I find in favor of the appellants and against the city. Although the Tax Review Board did not use the language normally associated with late appeals, namely nunc pro tunc doctrine, it is clear from a reading of its opinion that the Board believed that the taxpayers had been misled by the city into believing that they could appeal late. For this reason, the Board agreed to hear the appeals, and I find no error in their doing so.

Now, the second issue in the case is a substantive one, namely whether or not the mechanical amusement device [4] tax, acronym, MAD tax, which is set forth in the Philadelphia

Code in Section 19-901, may validly be applied to coin-operated devices that are used for the exhibition of film and live entertainment.

The appellants contend the MAD tax is invalid as applied to them basically on First Amendment grounds. They argue, for example, that the tax is a prior restraint. I think otherwise. I don't believe that this is a tax upon the expression of ideas. Instead, it is a content neutral tax upon doing business via coin-operated machines. As such, it's just another tax in a long line of taxes on, quote, "doing business," close quote. It resembles an amusement tax that's popular here in Philadelphia which theater and stadium owners typically pass on to their patrons.

With all, I find against the appellants and in favor of the city on the substantive issue. To the extent that it is relevant; I will incorporate here the [5] First Amendment discussion of Judge Goodheart in the case of All Purpose Vending vs. City of Philadelphia, Number 8507-3598. It' a slip opinion dated December 3, 1987 at Pages 1, 2, and 5 through 12.

In addition, there is some relevant language in the Commonweath Court's opinion in the appeal of the All Purpose Vending case. That would be All Purpose Vending vs. the City of Philadelphia, 561 Atlantic 2d, 1309, at 1311-12. Quote: "The ordinance does not act as a prior restraint on appellants' right of free speech." close quote.

Now, I have taken the time to issue this bench decision largely because I am sympathetic to the appellants' plight. It is difficult for a judge to view the ten-year odyssey that these taxpayers have had with anything less than sympathy. I am told that an appeal is likely. If that appeal occurs, I do not intend to

file a formal opinion but rather [6] will allow this on-the-record explanation to suffice.

Okay. Very well. An appropriate order will be entered in due course.

(Whereupon at this time, the matter was concluded.)